

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-20283

To be argued by
KEVIN J. MCKAY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDMUND GETTENS,

Petitioner-Appellant,

-against-

JOHN QUINN, Acting Chairman of the New York
State Division of Parole,

Respondent-Appellee.

On Appeal from an Order of the United States
District Court for the Eastern District of
New York

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7410

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

KEVIN J. MCKAY
Assistant Attorney General
of Counsel

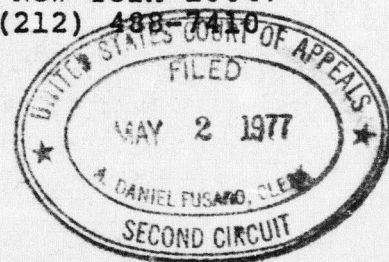


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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant appeals from a decision of the United States District Court for the Southern District of New York (Pratt, J.), dated February 9, 1977, which denied his application for a writ of habeas corpus. The District Court denied petitioner's motion

to reconsider the above decision, but granted a certificate of probable cause in an order dated February 23, 1977.

Questions Presented

1. Did the District Court properly find that petitioner had sufficient opportunity to litigate the validity of the search and seizure in state court and thus was precluded from relitigating his claim de novo in a federal habeas corpus proceeding by Stone v. Powell?

2. Did the state court's determination of petitioner's claim preclude further inquiry by the federal courts?

3. Was the inventory search conducted by police of the impounded car in compliance with the Fourth Amendment?

Statement of the Case

Petitioner was paroled on July 6, 1976 from Fishkill Correctional Facility where he was confined as a result of a judgment of conviction rendered by the County Court, Nassau County (Samenga, J.) on January 10, 1975. Petitioner was convicted, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree. He was sentenced as a second felony offender to an indeterminate term of imprisonment of not less than one and one-half years nor more than three years.

Petitioner's conviction was unanimously affirmed by the Appellate Division, Second Department on January 28, 1976 (51 A D 2d 686). Leave to appeal to the New York Court of Appeals was denied on March 4, 1976 (38 N Y 2d 942).

The Crime

On May 16, 1974, petitioner was arrested in Hempstead, New York, for the crime of criminal possession of a controlled substance in the fifth degree. Marijuana was discovered on petitioner's

person and in the automobile he was riding after the car was stopped by police for a traffic violation. On December 2, 1974, after petitioner's motions to suppress the marijuana and a written confession were denied, he withdrew his plea of not guilty and entered a plea of guilty to attempted criminal possession of a controlled substance in the sixth degree.

The State Suppression Hearing

On September 11, 1974, a hearing was held before Judge Samenga in the Nassau County Court to determine whether physical evidence seized from the impounded vehicle and statements made by the petitioner to the police should be suppressed. At the conclusion of the hearing, the court denied both motions.

At the hearing, Patrolman Warren Haacke of the Hempstead Police Department testified that on May 16, 1974, at approximately 1:20 a.m., he observed a 1967 Chevy northbound on Franklin Street in Hempstead. His attention was first attracted to the vehicle by its very loud exhaust noise. He ordered the vehicle to stop in the vicinity of the intersection of Main and

Jackson Streets, a location where parking is prohibited between 1 a.m. and 6 a.m. Haacke was accompanied at this time by Patrolman Peter Walters (A. 11-12).*

Haacke approached the vehicle and asked the operator, John Cruz, for his license and registration. There were two passengers in the Cruz vehicle, Edmund Gettens in the front seat and Idalio Galerez in the rear seat. When Haacke asked Cruz for his license and registration, he produced a registration and a learner's permit but no license (A. 13-14). Haacke then asked if anyone else in the vehicle had a valid New York State operator's license. The petitioner responded that he did. When asked to produce it, however, he admitted that he did not have a license. Haacke then asked the occupants to exit the vehicle (A. 15-16). At this point, no one was under arrest (A. 32). Since there was no licensed operator in the vehicle, and it was stopped in a no parking zone, Haacke decided to impound the vehicle (A. 16).

The Hempstead Police Department does not have an impound garage, so it uses private towing

* Page references preceded by "A" are to the minutes of the pre-trial suppression hearing contained in petitioner's appendix.

firms to tow vehicles away (A. 33). The Police Department is responsible for the contents of an impounded vehicle, as is the individual officer who impounds the vehicle (A. 45). Haacke believed that was an article in the rules and regulations of the Hempstead Police Department concerning the impounding of vehicles (A. 43).

After Haacke had determined that it was necessary to impound the vehicle, he decided to perform an inventory search of the vehicle. As Cruz exited the car, Haacke looked on the floorboard and saw a brown manila folder packet just at the edge of the driver's seat (A. 17, 35). The inside of the car was lighted by the interior lights and the street lights (A. 28). Haacke picked up the envelope, looked inside and saw a brown-greenish substance which he thought was marijuana (A. 18). Cruz, Gettens and Galerez were then placed under arrest (A. 19).

Haacke continued his examination of the vehicle and discovered a brown vinyl bag next to the front passenger seat. In this bag, Haacke found a large bag of what he believed to be marijuana, some

small manila envelopes, a set of scales, and a hash pipe (A. 19-20).

While Haacke was in the process of patting down Cruz and Galerez, Officer Walters checked the petitioner. Walters found a small manila envelope, containing four hand-rolled cigarettes in Gettens' right rear pocket (A. 20-21). Haacke then called for assistance. When another police vehicle arrived, petitioner was transported to Police Headquarters by Haacke and Walters (A. 21). The Cruz vehicle was driven to headquarters by Patrolman Wells, where it was released later (A. 47). Haacke issued summonses to Cruz for an improper muffler and for driving without a license (A. 29-30).

Haacke noted on his memo pad for the night of the arrest that the petitioner had been arrested at 1:20 a.m. (A. 50, 51). He made no entries regarding the other two occupants of the car and did not note anything about the impoundment of the vehicle (A. 51). He had filled out a Form 32 case report which stated that:

". . . the defendants were
stopped for VTL violation 375

(31). Upon investigation the driver, Juan Cruz, failed to produce an operator's license. The driver and occupants (2) were asked to step out of the motor vehicle. The complainant then noticed a small brown envelope on the driver's floorboard. Complainant opened it and found a green grass-like substance (marijuana) in envelope" (A. 60)

He had signed a Form 85-A, which had been typed by Detective Howell, pursuant to information supplied by Haacke, which reported that Haacke had observed a 1967 Chevrolet northbound on Main Street

"with loud mufflers. The arresting officer stopped the vehicle at the intersection of Jackson for violation of VTL 375(31). At this time the operator of the vehicle, Juan Cruz, could not produce a license. He was asked to exit the vehicle by the arresting officer. Upon exiting the vehicle the arresting officer observed a brown paper envelope containing a brownish green substance lying on the operator's side of the vehicle on the floor. The arresting officer conducted a lawful search of the vehicle incidental to the arrest and found a quantity of a brownish green substance. . ." (A. 61-62)

Patrolman Peter Walters testified that on May 16, 1974, at about 1:20 a.m., he was on a tour of duty with Officer Haacke. At that time, he and Haacke stopped a vehicle in which petitioner was a passenger. Walters heard Haacke ask the driver and the occupants if anyone had a license. Petitioner first responded that he had a license, but when Officer Walters asked the petitioner for his name and date of birth to check the license, petitioner admitted that he did not have a license (A. 68-69). The occupants were then ordered out of the car (A. 69). Walters heard Haacke say that he found a brown package containing what appeared to be marijuana. Walters then patted down petitioner and found an envelope in petitioner's back pocket with four marijuana cigarettes in it (A. 70). Walters asked him about the cigarettes and the petitioner started crying and said, "Oh, let me go, it's only four cigarettes" (A. 83).

The petitioner and the other two suspects were then transported to police headquarters. They were all taken to the complaint room where Walters advised them of their rights. Walters asked each one

if they understood their rights and they responded yes (A. 70).

Walters spoke to Cruz and then to the petitioner. He showed the petitioner the large bag of marijuana and asked him if it belonged to him. The petitioner responded that it did, but refused to tell Walters where he had gotten it (A. 71).

ROBERT HOWELL, a detective assigned to the Third Squad of the Nassau County Police Department, testified that he arrived at the Hempstead Police Station on May 16, 1974 at about 2:00 a.m. (A. 85-86). After his arrival, he had a conversation with Officer Haacke concerning this case (A. 84). Detective Howell then informed the petitioner of his constitutional rights and asked if he wished to have an attorney present. Petitioner responded that he did not want an attorney present and was willing to make a statement (A. 86-87). Howell told the petitioner that he and his two friends were going to be arrested. At that point, petitioner admitted to Howell that his two friends didn't have anything to do with the marijuana nor did they have any knowledge that it was in the car (A. 87). Howell

asked the petitioner if he would give a written statement to this effect and the petitioner agreed. Howell then wrote up a three page statement which the petitioner read and signed (A. 87-88).

The petitioner did not testify at the suppression hearing nor did he call any witnesses on his behalf.

At the conclusion of the hearing, the Court, in denying the motions to suppress, rendered the following opinion:

"Both sides having rested the Court now issues the following decision with regard to the defendant's motion to suppress the physical evidence urging People against Adams in support of that contention urging also People against Marsh, taking the position that the use of the vehicle, of impounding, as means of obtaining the evidence was a violation of the constitutional rights of the defendant has been given consideration by the Court.

The Court from the evidence before it finds that once it was determined that the operator of the vehicle was not licensed to drive and that the two passengers were not licensed to drive, were all directed to remove themselves from the vehicle. It was at this time, according to the testimony of Police

Officer Haacke, that he determined to impound the car and effect an inventory search; that in that process and even before that process began, upon the operator of the vehicle exiting the car by reason of the indoor lights in the vehicle as well as street lights which he described as vapor lights similar to daylight, he observed a package on the floor.

It is true that there is no testimony that the package constituted a plastic envelope which on visual contact would reveal its contents. However, premised upon the testimony of the police officer at the time of an intended inventory search, which I might add becomes suspect in any situation where contraband is eventually found, but which must be resolved on the probabilities at the time they are taking place constituted at the time in the Court's opinion an effort to effect an inventory search for purposes of impoundment.

Under the authority of People against Sullivan the Court of Appeals has sustained the position of police in properly safeguarding the property of the owner of the vehicle through the procedure known as impounding and the taking of inventory. A strong dissenting opinion in Sullivan holds that impounding is simply another work or another means of justifying an illegal search. Until such time as the determination of the dissenting opinion becomes the law of the State of New York the People against Sullivan holds that an inventory search when effected for purposes of impounding a vehicle is legal.

The Court finds from all the testimony not refuted and reasonably to be drawn from same premised upon credibility that

in fact the actions of Patrolman Haacke constituted an inventory search which revealed during that process the contraband which then interrupted the impoundment proceeding resulting in the arrest of the defendants, more particularly the defendant Edmund Gettens present before this Court. . . ." (A. 107-109)

The Opinion of the District Court

The District Court (Pratt, J.) denied the petition on the grounds that inventory searches conducted by police are constitutional under South Dakota v. Opperman, ___ U.S. ___, 96 S. Ct. 3092 (1976); Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973), and that the petitioner received an opportunity for full and fair litigation of his unlawful search and seizure claim in the state courts and is now barred from relitigating this claim by Stone v. Powell, ___ U.S. ___, 96 S. Ct. 3037 (1976).

POINT I

THE DISTRICT COURT PROPERLY FOUND
THAT PETITIONER RECEIVED AN
OPPORTUNITY FOR FULL AND FAIR
LITIGATION OF THE VALIDITY OF THE
SEARCH AND SEIZURE IN THE STATE
COURT AND WAS PRECLUDED FROM
RAISING THIS CLAIM DE NOVO BY
STONE v. POWELL.

The crux of petitioner's argument is that the state court did not allow him to develop the material facts relating to the impoundment and inventory search of the automobile. Further, that as a result of several adverse evidentiary rulings, petitioner was denied an opportunity to fully and fairly litigate his Fourth Amendment claim in the state courts.

Petitioner argues that Stone v. Powell, ___ U.S. ___, 96 S. Ct. 3037 (1976) does not bar his claim in the federal courts because the Court in Stone indicated that the criteria set forth in Townsend v. Sain, 372 U.S. 293 (1963) should be used to determine whether the habeas applicant received a full and fair evidentiary hearing in the state courts. Petitioner contends that the application of the six Townsend criteria to the present case leads to the conclusion

that he was denied a full and fair hearing in the state court.

Petitioner's arguments are misguided and completely without merit. In Stone v. Powell, supra at 3046, the Supreme Court held that federal habeas corpus relief may not be granted to a state prisoner on the ground that evidence used against him at trial was obtained in an unconstitutional search and seizure when the state has provided "an opportunity for full and fair litigation" of that Fourth Amendment claim (emphasis added).

The meaning of the Court's constant reference to "an opportunity for full and fair litigation" is crucial in determining when a state prisoner may raise a Fourth Amendment claim in a federal habeas corpus proceeding. While the Supreme Court failed to articulate what it meant by the above term, the reasoning behind the Court's decision provides some clues as to the import of Stone.*

* Some elucidation of the Stone decision may soon be provided as a result of the Supreme Court's granting of certiorari in Browder v. Director, Dept. of Corrections, 76-5325, 45 U.S.L.W. 3508 (January 17, 1977) which raises the question of whether incompetency of appointed defense counsel deprived petitioner of an opportunity to raise Fourth Amendment claims in the state courts. 45 U.S.L.W. 3524.

In discussing the exclusionary rule, the Supreme Court noted that the rule was not a constitutional right, but a "judicially created means of effectuating the rights secured by the Fourth Amendment." Stone, supra at 3046. A review of the costs and justifications for the exclusionary rule led the Court to the conclusion that its primary purpose, deterrence of unlawful police conduct, was too minimal a concern in a federal habeas proceeding. The Court found no reason to believe that the effectiveness of the rule would be eroded if search and seizure claims could not be raised in federal habeas courts. Id. at 3046-3052.

While the costs of applying the exclusionary rule, including diversion from the question of guilt and innocence and the exclusion of typically reliable evidence, are great, the Court could at best find a small deterrent force in the possibility that a search and seizure, previously upheld in the state courts, might be declared illegal in a federal collateral proceeding. The resulting benefit from this small disincentive to Fourth Amendment violations is outweighed by the detrimental ramifications to the

criminal justice system caused by the rule. Id. at 3051-52; Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring opinion).

The language in Stone is clearly supportive of the view that the state courts should be the final judges of whether a Fourth Amendment violation has been committed where the petitioner was provided with an opportunity to litigate his claim in the state courts. The obvious intent of Stone to limit federal review of Fourth Amendment claims would be defeated if this Court were to adopt petitioner's argument that the guidelines promulgated in Townsend v. Sain, supra, govern the scope of Stone.

Petitioner misconstrues the decision in Stone when he argues that if a state prisoner is entitled to an evidentiary hearing under 28 U.S.C. § 2254(d) and Townsend v. Sain, supra, then he should be permitted to raise his Fourth Amendment claim in a federal habeas proceeding. Petitioner's argument is inconsistent with the primary rationale of Stone, i.e., that the exclusionary rule serves little purpose at the federal collateral level.

Moreover, to engraft the Townsend analysis onto all Fourth Amendment claims presented in the federal courts which were raised earlier in the state courts, would create additional litigation for the federal courts. The federal courts would be constrained to hold a hearing on the Townsend issue alone when presented with a Fourth Amendment claim. The Court in Stone was clearly concerned with the growing volume of habeas applications and intended to alleviate this problem by excluding the category of Fourth Amendment claims from federal review. The Court in O'Berry v. Wainwright, 546 F. 2d 1204, 1212 (5th Cir., 1977), pet. for cert. filed, April 7, 1977, remarked that "we would be blind to reality to pretend that the practical effect of [the Stone] decision is not a limitation on federal court jurisdiction." Petitioner would have this court totally eviscerate the true import of Stone and reduce it to a mere reiteration of Townsend v. Sain, supra. See Pulver v. Cunningham, 419 F. Supp. 1221 (S.D.N.Y., 1976).

Petitioner's heavy reliance on the Supreme Court's "cf" footnote to Townsend as an explanation of what is meant by "an opportunity for full and fair consideration" is unwarranted. While the Townsend

categories may be of some assistance, their full application to a Stone situation would distort the court's intent. Significantly, the Court, in O'Berry v. Wainwright, supra at 1211-1212, rejected the "whole-sale use" of the Townsend formula in determining whether petitioner's Fourth Amendment claim was reviewable in a federal habeas proceeding.

In Denti v. Commissioner of Correctional Services, 421 F. Supp. 557 (S.D.N.Y., 1976), the Court observed:

"The emphasis of the formulation of the Stone court appears to be on provision by the state of an opportunity fully and fairly to air the claim, not, as in earlier decisions under 28 U.S.C. § 2254 (d), on the fullness or fairness of the hearing that was conducted. (citations omitted) This understanding is in harmony not only with the Court's constant phrasing of the exception, (i.e., 'an opportunity for full and fair litigation of a Fourth Amendment claim'), but more importantly with the guiding concern of the Stone court for principles of finality and comity in state criminal proceedings" (citations omitted) 421 F. Supp. 559.

While Stone has generated much confusion by its

failure to elaborate on what it meant by an "opportunity for full and fair consideration," several courts have struggled to define the true meaning of the decision. In Gates v. Henderson, ___ F. 2d ___, No. 76-2005, Slip Op. 1345 (2d Cir., January 12, 1977), rehearing en banc granted, March 7, 1977, the majority held that the petitioner did not deliberately bypass the state procedure for raising his Fourth Amendment claim and that the state court's failure to directly address petitioner's claim deprived him of an opportunity to litigate his claim. Petitioner had raised a general constitutional objection at trial to the introduction of his palmprints. The District Court concluded that petitioner's objection was not "sufficiently specific" for state law purposes of review, and that this procedural default barred federal habeas relief.

The majority in Gates was clearly concerned with the fact that none of the three state opinions reviewing petitioner's claim even mentioned the objection cited by petitioner. They found it plausible that the state courts might not have been aware of or ignored petitioner's objection. Since it was unclear whether petitioner's claim was ever reviewed on the merits, the Court held that petitioner should be given

an opportunity to litigate his claim. Unlike Gates, the petitioner in our case had a full and fair hearing on his claim in state court which was concluded by comprehensive findings of fact by the state judge. There is no doubt whatsoever that the petitioner was afforded an extensive hearing to litigate his claim.

The dissent in Gates vehemently disagreed with the majority and would have affirmed the lower court on the authority of Stone. The dissent pointed out that the majority ignored the obvious intent of Stone and failed to accord any deference to the public policy enunciated in that decision. (Slip Op. 1361-62).

In Simmons v. Clemente, ___ F. 2d ___, No. 76-2117, Slip Op. 2531 (2d Cir., March 24, 1977), this Court held that petitioner's Fourth Amendment claim was precluded by Stone. The Court found that since petitioner's claim had been litigated in a Huntley hearing and in a later hearing on petitioner's motion to vacate her conviction and findings by the state court had been issued after both hearings, it was clear that petitioner had been given an opportunity for full and fair consideration of her claim.

Significantly, the Court did not employ the Townsend standards to scrutinize the state court hearings.

In O'Berry v. Wainwright, supra, the petitioner failed to raise his Fourth Amendment claim arising out of a warrantless search of his automobile before or at trial, and no direct appeal was taken from his conviction. After a state court ruled that petitioner's right to appeal was frustrated by state action, petitioner was permitted to argue his Fourth Amendment claim before the appellate court. The court affirmed the conviction and ruled that petitioner had not preserved the issue for appellate review since he did not raise the claim at trial.

In holding that habeas relief was precluded by Stone, the Fifth Circuit stated:

"We conclude for several reasons that the Stone 'opportunity for full and fair consideration' requirement is satisfied where the state court is squarely faced with Petitioner's Fourth Amendment claim, but chooses to resolve that claim on an independent, adequate, non-federal state ground, at least where that state ground does not unduly burden federal rights." (footnotes omitted) 546 F. 2d at 1216-1217.

The O'Berry Court further found that its decision was consistent with Stone's constant use of the word "opportunity" and also with Stone's cost-benefit analysis of the exclusionary rule, 546 F. 2d at 1214. Moreover, the Court reasoned that permitting the state court to resolve Fourth Amendment claims on state grounds furthers the Stone view that state courts are as competent as federal courts to insure protection of federal constitutional rights. Id. at 1215.

In Pulver v. Cunningham, supra, petitioner challenged the state court's denial of his motion to suppress seized evidence. The Court ruled that Stone barred petitioner's claim and continued

" . . . even assuming that the suppression hearing was not a full and fair fact hearing within the meaning of Townsend v. Sain, supra, does not mean that petitioner was denied a full and fair opportunity to litigate his Fourth Amendment claims. Stone v. Powell, supra, cannot be read merely as a reiteration of Townsend v. Sain, supra. It is apparent that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court. That is, it includes that corrective action available through the appellate process on direct review of the judgment of conviction." (419 F. Supp. at 1224).

Thus, petitioner must demonstrate that he was denied an opportunity for full and fair litigation of his claim at trial and on direct review. In our case, petitioner was not only provided with an extensive pretrial hearing to vent his claim, but also raised it on direct review. See also Kahn v. Flood, No. 76-2138, Slip Op. 1919 (2d Cir., February 22, 1977); Perry v. Vincent, 420 F. Supp. 1351 (E.D.N.Y., 1976).

POINT II

THE STATE COURT DETERMINATION OF PETITIONER'S FOURTH AMENDMENT CLAIM BARS FURTHER INQUIRY BY THE FEDERAL COURTS.

The authority of a federal court exercising habeas corpus review of a state conviction is narrow. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). In order for a state conviction to be overturned by a federal habeas court, the petitioner must demonstrate not merely that the state action was "undesirable, erroneous, or even 'universally condemned', but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146 (1973).

It is well settled that under 28 U.S.C. § 2254

(d), a factual determination of a state court must be presumed correct in a federal habeas corpus proceeding. The burden is on the petitioner to establish, by convincing evidence, that the factual determination of the state court is erroneous. See LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Lewis v. Henderson, 520 F. 2d 896 (2d Cir.), cert. den. 423 U.S. 998 (1975); United States ex rel. Stanbridge v. Zelker, 514 F. 2d 45 (2d Cir., 1975); United States ex rel. Regina v. LaVallee, 504 F. 2d 580 (2d Cir., 1974); United States ex rel. Coleman v. Mancusi, 423 F. 2d 985 (2d Cir., 1970).

The petitioner may not merely seek a re-examination of facts already probed by the state court. United States ex rel. Stanbridge v. Zelker, supra. Petitioner has not satisfied any of the exceptions of 28 U.S.C. § 2254(d) that would permit a re-examination of the facts found by the state court.

The crux of petitioner's challenge to the state court's determination is that it is "not fairly supported by the record" and the "material facts were not adequately developed at the state court hearing." 28 U.S.C. § 2254(d)(2) and (5). This argument is based

on the ground that the trial court's evidentiary rulings unfairly restricted defense counsel's cross-examination of the arresting officer concerning the Hempstead Police Department's rule on car impoundments (A. 40-41).^{*} The District Court found this argument to be completely without merit.

Despite petitioner's claims to the contrary, the state court did not prevent defense counsel from questioning the arresting officer on the police department's impoundment regulations. Defense counsel's

^{*} The following colloquy occurred during the cross-examination of Officer Haacke:

"[DEFENSE COUNSEL]: And is it your contention, Officer, that you followed the rules and regulations of the Hempstead Police Department in connection with the impounding of that vehicle?

[PROSECUTOR]: Objection, Your Honor. That would be irrelevant.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Your Honor, I submit that this is very relevant. He's trying to hang this search on an inventory search on an impoundment when in fact no impoundment took place.

[PROSECUTOR]: Objection to defense counsel's characterization of the witness' testimony.

THE COURT: Sustained."

question concerning the police officer's belief as to whether he complied with the regulations was irrelevant and defense counsel's characterization of the officer's testimony was clearly improper. As the District Court pointed out, defense counsel was, in no way, prevented from pursuing his line of questioning on the police regulations, when and why the officer decided to impound the car or test the officer's credibility.

Even assuming arguendo, that the state court's evidentiary rulings were erroneous, petitioner was not precluded from introducing the police regulations into evidence himself, and if there were no written rules, to call witnesses to testify as to what the rules were regarding impoundment. Moreover, petitioner failed to avail himself of the opportunity to call witnesses to refute the police officers' testimony or challenge their credibility. If petitioner disagreed with the testimony of the police officers, he should have taken the stand himself.* Petitioner cannot inadequately prepare his case or withhold evidence and testimony from the pre-

* The only testimony at the suppression hearing was given by two police officers and a detective.

trial suppression hearing and then argue that Stone does not preclude his writ since he did not have an opportunity to fully litigate his claim.

The District Court correctly found that the trial court's factual determination on whether there was a legal search and seizure was supported by the record. The record does not indicate that the state judge improperly credited the officers' testimony regarding their intention to impound the car before the search was conducted. Therefore, the state court's determination must be presumed correct since it is well supported by the record. United States ex rel. Lewis v. Henderson, supra.

Petitioner's challenge to the evidentiary rulings themselves is not properly reviewable on federal habeas review. It is well established that errors of law in a state criminal proceeding are not subject to review in a federal habeas proceeding unless that error deprived the petitioner of a fundamentally fair trial. See Buchalter v. New York, 319 U.S. 427 (1943); Schaefer v. Leone, 443 F. 2d 182 (2d Cir.), cert. den. 404 U.S. 939 (1971); United States ex rel. Terry v. Henderson, 462 F. 2d 1125 (2d Cir., 1972); United States

ex rel. Sadowy v. Fay, 284 F. 2d 426 (2d Cir., 1969).

While no trial was conducted in the present case due to petitioner's plea of guilty, the suppression hearing afforded petitioner a full and fair review of his Fourth Amendment claim.

POINT III

THE INVENTORY SEARCH AND SEIZURE
OF CONTRABAND BY THE POLICE
OFFICERS WAS CONDUCTED IN FULL
COMPLIANCE WITH THE FOURTH
AMENDMENT.

It is well settled that courts have established differing standards under the Fourth Amendment for the search of an automobile as compared to a home. Warrantless searches of a vehicle have been upheld in situations in which a search of a home would not. Cardwell v. Lewis, 417 U.S. 583, 589 (1974); Cady v. Dombrowski, 413 U.S. 433, 439-440 (1973); Chambers v. Maroney, 399 U.S. 42, 48 (1970).

The reasons for the less stringent warrant requirements for automobiles is due to the fact that the mobility of cars create exigent circumstances where warrants are impractical, Carroll v. United States, 267 U.S. 132, 153-154 (1925); Coolidge v. New Hampshire, 403

U.S. 443, 459-460 (1971). Moreover, the expectation of privacy as to one's automobile is appreciably less than that relating to one's home. Cardwell v. Lewis, supra at 590.

The Supreme Court in Cady v. Dombrowski, supra at 441 recognized the "community caretaking functions" of police officers which may involve the removing of disabled cars, cars blocking the movement of traffic or cars violating parking regulations. In the instant case, Police Officer Haacke decided to impound and remove the vehicle after he discovered that none of its occupants had a valid New York State driver's license, and also because it was stopped in a no parking zone. The decision to impound the car was proper because it prevented an unlicensed driver from operating the car in violation of Section 509(1) of the Vehicle and Traffic Law* and at the same time safeguarded the automobile and its contents until it could be returned to its owner. See also Section 1204(b)(1) of Vehicle and Traffic Law.

After Police Officer Haacke decided to impound

* § 509(1) of Vehicle and Traffic Law

" . . . no person shall operate or drive a motor vehicle upon a public highway of this state . . . unless he is duly licensed pursuant to the provisions of this chapter."

the car, he asked the occupants to exit the vehicle so he could conduct an inventory search of the contents of the car. The envelope containing the marijuana was noticed by Haacke protruding from under the driver's seat as soon as the driver exited the car. After Haacke inspected the contents of the envelope and believed it to be marijuana, the occupants were then placed under arrest. Marijuana cigarettes were later found in petitioner's pants.

The routine police procedure of inventorying the contents of impounded cars has been upheld as reasonable police intrusions by state and federal courts alike. South Dakota v. Opperman, ___ U.S. ___, 44 U.S.L.W. 5294, 5295 (July 6, 1976) and cases cited on page 5296; People v. Sullivan, 29 N Y 2d 69 (1971). These inventory searches are conducted to safeguard the car and its contents while in police custody and to protect the police against claims of lost or stolen property by the car owner. In some instances, an inventory search is conducted for the safety of the police officer. See Cooper v. California, 386 U.S. 58, 61-62 (1967); Harris v. United States, 390 U.S. 234 (1968).

Officer Haacke was complying with the pro-

cedure of the Hempstead Police Department which required an officer who has impounded a car to conduct an inventory search of the car to protect its contents. An inventory search is especially appropriate where, as in the instant case, the police department does not have its own impoundment garage and must hire a private towing service to tow the car. Officer Haacke testified that the Police Department was responsible for the contents of an impounded vehicle along with the arresting officer. See United States v. Kelehar, 470 F. 2d 176, 178 (5th Cir., 1972). Cruz's vehicle was later driven to the police station by a police officer and was soon released when the petitioner exonerated the driver and the other occupant by making a confession.

In South Dakota v. Opperman, *supra*, the defendant's car was impounded for multiple parking violations and during an inventory of the car's contents, marijuana was found in the glove compartment. When the defendant arrived at the police station to claim his car, he was arrested. The Supreme Court upheld the denial to suppress the evidence stating that the police's caretaking procedure of inventorying the contents of an impounded car was reasonable under the Fourth Amendment. In the instant case, the

inventory search conducted after the legal impoundment of the car was also reasonable and was not a pretext to discover evidence of a crime. See Cady v. Dombrowski, supra; People v. Sullivan, supra.

CONCLUSION

THE JUDGMENT OF THE DISTRICT
COURT SHOULD BE AFFIRMED IN
ALL RESPECTS.

Dated: New York, New York
May 2, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

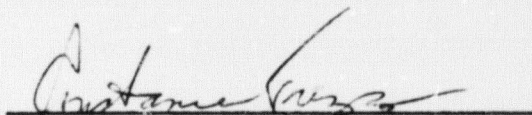
KEVIN J. MCKAY
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

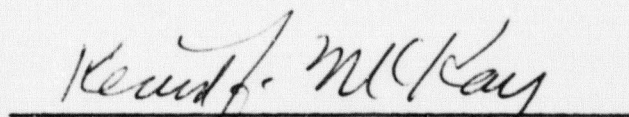
CONSTANCE TREZZA , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Respondent-Appellee
herein. On the 2nd day of May , 1977 , she
served the annexed upon the following named person :

HOWARD B. COMET, ESQ.
Legal Aid Society
Nassau County
Criminal Division
400 County Seat Drive
Mineola, N.Y. 11501

Attorney in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.



Sworn to before me this
2nd day of May , 1977



Assistant Attorney General
of the State of New York